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April 26, 2002

Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
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APR 26 2002

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Robert L. Pettit
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EX PARTE OR LATE FILED

Re: *Ex Parte* Presentation in WT Docket No. 99-168 & IN Docket No. 01-74
(Auctions 31 & 44).

Dear Ms. Dortch:

On Thursday, April 25, 2002, Steve Sharkey of Motorola, Inc., Diane Cornell of CTIA and Mary Jo Manning and I met with Paul Margie of Commissioner Copp's staff, to discuss the above-referenced proceedings regarding Auctions 31 and 34.

The purpose of this meeting was to discuss Motorola's and CTIA's request for a delay in the 700 MHz auction and the legal authority that the Commission has to postpone that auction and the litigation aspects of any decision to postpone. The substance of our discussions are further reflected in the attached document, which is being provided to Mr. Margie.

An original and one copy of this letter are being provided for inclusion in the docket. If you have any questions or need any additional information, please let me know.

Sincerely,

Robert L. Pettit

Enclosure

cc: Paul Margie, Esquire (w/ enclosure)

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APR 26 2002

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Postponement of the 700 MHz Auctions

This paper discusses two issues that have arisen in the Commission's consideration of a delay of the 700 MHz auction numbers 31 and 44. As demonstrated below, the Commission is not compelled by statute to hold the 700 MHz auctions in 2002. Indeed, the Commission is well within its authority to postpone these auctions. Further, the agency would not encounter a viable challenge to its decision to postpone the auction because no party would have standing to pursue such a challenge.

I. The Commission's Spectrum Management Responsibility Overrides an Auction Date that Conflicts with the Best Use of the Resource.

The Commission is required by the Communications Act to determine and foster the highest and best use of the spectrum resource. Because the Commission has not yet made determinations, which are essential to exercising this responsibility with respect to the 700 MHz band, and because considerable uncertainty persists regarding the clearing of this band, it is well within its authority to postpone the 700 MHz auction. In fact, it is compelled to do so.

Even assuming a statutory requirement for revenues to be collected in fiscal year 2002 exists,¹ the Commission cannot view the timing of the auction through that single statutory prism because the auction does not implicate just one overriding provision of law.² Rather, the timing of the auction implicates at least three other statutory provisions—Sections 309(j)(3), 151, and 309(j)(14) of the Communications Act, as amended. In delaying the 2000 date for auction 31, the Commission stated that Section 309(j)(3) is a "statutory mandate [that the Commission] design auction rules and procedures so as to manage the radio spectrum effectively and efficiently in the public interest." The Commission also determined that Congress added this provision "to ensure that scarce spectrum is put to its highest and best use."³ This mandate includes

¹ The operative statutory language does not specifically require any auction revenues by September 2002. See *infra* at pgs. 5-6.

² See Balanced Budget Act of 1997, Pub. L. No. 105-33, 111 Stat. 251 §3003 (adding a new Section 309(j)(14) requiring auction of recaptured broadcast television spectrum with report to Congress on the total revenues from the competitive bidding of reclaimed licenses by September 30, 2002) and §3007 (uncodified, reproduced at 47 U.S.C. § 309(j) note 3, setting a September 30, 2002 date for completion of certain auctions and deposit of proceeds). In a specific and later statute, the Consolidated Appropriations Act, 2000, Pub. L. No. 106-113, 113 Stat. 2502, Appendix E. Sec. 213 ("CAA"), Congress rescheduled the Balanced Budget Act of 1997 Upper 700 band auction timetable from 2002 to 2000. This statute also removed Section 337(b)(2), which referred to competitive bidding for the Upper 700 band, and, in so doing, superceded any connection between the Upper band and the 2002 date contained in Section 3007. It follows that had Congress believed that Section 309(j)(14) was the operative code section calling for the deposit of all 700 MHz auction revenues by September 30, 2002, the CAA also would have amended this code section. Because the CAA did not make this change, it is a fair to interpret that Congress does not view Section 309(j)(14) as compelling an auction of *un-reclaimed* licenses in FY 2002.

³ Cellular Telecommunications Industry Association et al.'s Request for Delay of the Auction of Licenses in the 747-762 and 777-792 MHz Bands Scheduled for September 6, 2000 (Auction No. 31),

conducting auctions so as to "ensure that interested parties have sufficient time to develop business plans, assess market conditions, and evaluate the availability of equipment for the relevant services."⁴ The bedrock goals of the Communications Act are set forth in Section 151⁵ (which is referenced in Section 309) and direct the agency to promote the national defense and safety of life. Section 309(j)(14) permits incumbent television broadcasters in the 700 MHz band to remain there until December 31, 2006, or an 85% penetration rate is achieved.⁶ As the Commission has observed, this timing is at odds with an auction in 2000, 2002 or at any time before the transition timing is determinable.

In light of these competing statutory directions, the Commission has a substantial factual basis from which to conclude that conducting the auction now would violate Section 309(j)(3). On its face, a 2002 disposition of this spectrum would be premature since access to the spectrum by the new licensees is, at best, problematic for three reasons. First, it is not possible to identify with any specificity the broadcasters likely to participate in the so-called spectrum exchange or otherwise willing to consider early relocation. Second, it is not possible to determine what price the broadcasters would demand or the new bidders would be willing and able to pay. Third, it is unlikely that there will be any symmetry in access actions, leading to the likelihood of disparate availability of spectrum across the country. Proceeding in the face of these unknowns and risks will not yield the "highest and best use" of the spectrum, but rather a highly inefficient use of the spectrum, at least for the foreseeable future.

Pursuant to the Commission's responsibilities in Section 309(j)(3) to manage the spectrum effectively and efficiently,⁷ it is not only authorized to postpone this auction, it appears obligated to do so.⁸ A 2002 auction also is premature because the Commission has not yet exercised its spectrum management responsibilities as required under Section 309(j)(3) and Section 1 of the Communications Act, the latter of which requires the Commission to promote "the national defense [and]... safety of life and property."⁹ Clearly, the national defense and public safety communications

(Continued . . .)

FCC 00-304 at ¶ 6 (rel. Sept. 12, 2000) (quoting in part H.R. Conf. Rep. 105-217 (July 29, 1997)). ("Delay of Auction No. 31")

⁴ 47 U.S.C. § 309(j)(3)(E)(ii). In pertinent part, the Communications Act provides:

[T]he Commission . . . shall seek to promote the purposes specified in Section 1 of this Act and the following objectives:

(E) ensure that, in the scheduling of any competitive bidding under this subsection, an adequate period is allowed –

(ii) after issuance of bidding rules, to ensure that interested parties have a sufficient time to develop business plans, assess market conditions, and evaluate the availability of equipment for the relevant services.

⁵ Section 1 of the Communications Act of 1934, ch. 652, title I, Sec. 1, 48 Stat. 1064 (June 19, 1934), codified at 47 U.S.C. § 151.

⁶ 47 U.S.C. § 309(j)(14)(A); 47 U.S.C. § 309(j)(14)(B)(iii).

⁷ 47 U.S.C. § 309(j)(3)(D).

⁸ Delay of Auction No. 31 at ¶ 6.

⁹ 47 U.S.C. § 151.

requirements were substantially altered after the terrorist attacks of September 11, 2001 and the subsequent Homeland Security and military initiatives. The Commission has created a Task Force specifically responsible for making resource and security determinations and recommendations, underscoring the agency's sensitivity to the changed requirements and emphasis. Public safety or government access to a larger portion of the 700 MHz band is at the heart of several alternatives for addressing these altered needs, including the recently initiated 800 MHz interference proceeding.¹⁰ However, the Commission has not yet received comments, much less reassessed, public safety or Homeland Security needs since these needs were so radically altered. Were the auction to proceed before the Commission assesses these needs and the options for meeting them, the auction would remove from consideration, or substantially complicate, access to a source of spectrum that some consider to be among the most promising.

Moreover, despite the Commission's best attempts,¹¹ the transition to digital television continues to be plagued by uncertainties, while the effectiveness of the steps taken by the Commission, such as the voluntary clearing rules, has been questioned. While some uncertainties "may continue for some time,"¹² and may not be inconsistent with proceeding to auction, it remains impossible at this time to predict the timing or duration of the digital transition or even the local or national clearing of particular frequencies – or, indeed, if the spectrum will ever be available pursuant to Section 309(j)(14). It would be contrary to the Section 309(j)(3) mandate of effective and efficient management for the auction to occur before the agency has resolved the most basic spectrum clearing issues.

As Chairman Powell stated in a recent letter to Representative Tauzin, the transition to digital television is mired in debates between key stakeholders,¹³ which thwart the digital television timetable. Chairman Powell stated that his digital television plan would "provide a near-term boost to the DTV transition."¹⁴ If it is successful, the Chairman's plan could also lead to a better ability to determine the timing and duration of that transition. Such improved predictability could remove a great deal of the current uncertainty, increasing the likelihood the spectrum will be put to the highest and best use. Chairman Powell's acknowledgment of the complexity of the transition is at odds with the assertion that money alone will motivate 700 MHz broadcasters to relocate from their analog channel assignments before the dates set out in Sections 309(j)(14)(A) and (B). To conduct the auction before the Chairman's plan has the opportunity to achieve a greater measure of predictability concerning the transition is,

¹⁰ *Improving Public Safety in the 800 MHz Band, Consolidating the 900 MHz Industrial/Land Transportation and Business Pool Channels*, WT Docket No. 02-55, FCC 02-81 (rel. Mar. 15, 2002).

¹¹ As Mr. Sugrue points out in his letter to Thomas Wheeler, the Commission has affirmed and further refined its voluntary clearing policies, and helped potential bidders develop a better understanding of combinatorial bidding. Letter to Thomas E. Wheeler from Thomas J. Sugrue, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, dated April 10, 2002.

¹² *Id.* at 2.

¹³ Letter to W.J. "Billy" Tauzin, from Michael K. Powell, Chairman, Federal Communications Commission, dated April 4, 2002.

¹⁴ *Id.* at 1.

undoubtedly, an "auction for the sake of auction."¹⁵ It would deprive potential bidders of a meaningful opportunity to develop business plans and assess market conditions, including when a successful bidder may commence using that spectrum, and thus, it would violate Section 309(j)(3)(E)(ii) of the Communications Act.¹⁶

As a result, the Commission is faced with a fundamental statutory conflict: proceeding with the auction in 2002 facially appears to violate Section 309(j)(3), while delaying the auction appears to some to contravene another provision of law.¹⁷ Under well-settled judicial interpretation, conflicts deemed to create a statutory ambiguity may be reconciled by reasonable statutory interpretation. As the United States Court of Appeals for the District of Columbia Circuit has found, "[i]f the language of one statutory phrase, however, 'plain,' collides with the literal command of another or of the statute as a whole, the resulting ambiguity necessitate[s] examination of extrinsic evidence of legislative intent to reconcile the conflict."¹⁸ The "literal words of the statute are presumptively conclusive of legislative intent, but that presumption may be defeated by contrary indications of intent also evident on the face of the statute."¹⁹ And, an agency's interpretation will be upheld under general *Chevron* principles as long as that interpretation is reasonable.²⁰

This principle of administrative law applies with no less force where a specific statutory deadline is involved. For example, in a recent case, the D.C. Circuit upheld a 15-month moratorium on the filing of railroad merger applications notwithstanding a legislative requirement that such mergers be accepted and processed within a Congressionally proscribed time limit.²¹ As the Court said, "We are persuaded . . . by the numerous cases upholding agency decisions to defer actions mandated by statute . . . where doing so is administratively necessary in order to realize the broader goals of

¹⁵ Letter to Michael K. Powell, Chairman, Federal Communications Commission, from Thomas E. Wheeler, President and CEO, Cellular telecommunications & Internet Association, dated April 3, 2002 at 2 ("CTIA Request"). Further, as the Commission has recognized, since the tragedies of September 11, 2001, there are new and different public safety and homeland security concerns. See *Improving Public Safety Communications in the 800 MHz Band, Consolidating the 900 MHz Industrial/Land Transportation and Business Pool Channels*, WT Docket No. 02-55, FCC 02-81 (rel. Mar. 15, 2002) at ¶ 18.

¹⁶ Congress intended for Section 309(j)(3) to play an integral role in the timing of auctions. As detailed by Committee report, "the Commission could choose to delay assignment of licenses by competitive bidding if it determines that conducting auctions at a later date 'will better attain the objectives of recovering for the public a fair portion of the value of the public spectrum resource and avoiding unjust enrichment.'" Report of the Committee on the Budget, U.S. House of Representatives Report, 105-148, Balanced Budget Act of 1997.

¹⁷ Section 309(j)(14)(C) requires a report to Congress from the Commission by September 30, 2002 on the revenues derived from the auction of reclaimed broadcast licenses.

¹⁸ *Montana v. Clark*, 749 F.2d 740, 745 (D.C.Cir. 1984), cert. denied sub nom. *Montana v. Hodel*, 474 U.S. 919 (1985) (citations omitted). In the *Montana* case, the court upheld the Secretary of the Interior's failure to award certain mining fees to the State of Montana notwithstanding a statutory directive making the State eligible for such fees.

¹⁹ *Id.* at 746.

²⁰ *Id.* at 745 (citing *Chevron USA, Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984)).

²¹ *Western Coal Traffic League v. Surface Transportation Board*, No. 00-1115, 2000 U.S. App. LEXIS 16154 (D.C. Cir. July 14, 2000).

the same statute²² Citing the TRAC case,²³ the Court also determined that the principle applies equally to cases "in which an agency failed to meet a statutory deadline; in these cases we have similarly considered whether the agency has demonstrated a reasonable need for delay in light of the duties with which it has been charged."²⁴ Thus, a deadline, no matter how clearly articulated, must be read in the context of other statutory provisions.

In light of the statutory conflict evident in this case and the resulting ambiguity, it necessarily falls to the Commission to make a reasonable accommodation of the conflicting statutory goals. In doing so, it is a permissible interpretation for the Commission to conclude that Congress intended for the 700 MHz spectrum auction to be completed by September 30, 2002 *only* if the auction could be completed consistent with the auction provisions of the Communications Act of 1934. This interpretation is strengthened by the fact that Section 309 (j)(14)(C) directs the Commission to act consistent with Section 309(j)(3), which, as discussed above, mandates that the Commission's auction actions achieve the most efficient and highest and best use of the spectrum.

Further, the Commission's earlier decision to delay the auction beyond the 2000 date set in the Consolidated Appropriations Act, 2000 was based on the agency's determination that such a statutory ambiguity existed, and that the agency was required by Section 309(j)(3) to consider what action would result in the highest and best use of the spectrum. Congressional reaction to this Commission decision suggests Congress acknowledged the agency's overarching management responsibilities. When the Commission determined then that the public interest would not be served by an auction under the 2000 timeframe, the date passed, as did the Congressional deadline. No further action was taken by Congress to question the Commission's action or to establish a new date, which supports the interpretation that Congress did not object to the agency's determination.²⁵

Granting an auction delay beyond 2002 would represent the most reasonable accommodation of the conflicting legislative goals at issue here. Indeed, it would give the Commission sufficient time to address the broader broadcast relocation actions

²² *Id.* at 12-13.

²³ *Telecommunications Research and Action Center v. FCC*, 750 F.2d 70 (D.C. Cir. 1984).

²⁴ *Western Coal*, 2000 U.S. App. LEXIS 16154, at 17-18. In addition, unrealistic statutory deadlines imposed by Congress are not easily enforced. "When a petition complains to a court that an agency has not met a statutory deadline, the judge typically issues an order requiring that the agency act by some subsequent judicially determined deadline. More often than not, the agency fails to meet that deadline, and the court establishes a new deadline. The sequence continues until the agency finally acts in the matter, usually years after the original statutory deadline." Davis & Pierce, *Administrative Law Treatise* § 12.3, at 225.

²⁵ In letters to then-Commission Chairman William Kennard, Senators Pete Dominici and Ted Stevens publicly supported the delay. Letter to past Commission Chairman William E. Kennard from Senator Pete Dominici, Chairman, Senate Budget Committee, dated May 5, 2000; Letter to Chairman William E. Kennard from Senator Ted Stevens, Senate Appropriations Committee, dated July 29, 2000.

(such as described in Chairman Powell's Digital Television Plan)²⁶ as well as the public safety and national security communications infrastructure needs. This postponement, in turn, would provide prospective bidders a better understanding of how and when the 700 MHz bands would be available for commercial use, and enable more realistic business plans and market analyses. Further, as mentioned above, the developments in response to the terrorist attacks include a call for a reexamination of public safety, Homeland Security and other government communications needs in light of the new demands being imposed on first responder communications systems. This reexamination may conclude that additional spectrum resources are required, and there are limited options for meeting such a requirement in an efficient and effective manner. Obviously, these developments and new demands constitute a critical public interest consideration, which was unknown when the auction dates were set in 1997 and 1999, and are developments that the Commission is compelled to consider before it proceeds with actions that could be counterproductive or preemptive.

In short, the Commission will be well within the law to postpone the 700 MHz auction.²⁷ Indeed, it will best serve its fundamental obligation to allocate spectrum in the most efficient and effective manner, and, in turn, achieving its highest and best use. Neither the statute in question nor principles of administrative law requires blind adherence to a particular auction date—instead, they compel prudence.

This discussion, of course, presumes that the Commission faces a legislative direction to auction this spectrum before September 2002. However, the relevant statutory language creates a substantial threshold question as to whether current law requires any such auction. There are two references to the 2002 date in current law: Section 309(j)(14)(C)(ii) and Section 3007 of the Balanced Budget Act of 1997. Section 309(j)(14)(C)(ii) calls for a *report* to Congress on the *revenues* derived, not a deposit of revenues as other deadline language has been constructed. Further, the provision refers to *reclaimed* spectrum. Section 309(j)(14)(A) and (B) allow incumbent television stations to remain on their analog channels until 2006 or an 85% digital television penetration rate is achieved, suggesting that the licenses to be auctioned under Section 309(j)(14)(C)(ii) were intended to be those which are voluntarily returned before the cut off, not all the 700 MHz licenses. Because no broadcast license has been returned, there is nothing to auction, and the report to Congress would so indicate.

Further, Section 309(j)(14)(C) specifically calls on the Commission to conduct the reclamation and auction process consistent with Section 309(j)(3). Hence, the agency is compelled to consider broader statutory goals, including spectrum efficiency, national

²⁶ See also Administration Proposals to reschedule 700 MHz auctions and to establish new procedures for broadcast relocation. Budget of the United States for fiscal year 2003; Letter to the Honorable Richard B. Cheney from Theodore W. Kassiniger, General Counsel, Department of Commerce, dated February 28, 2002.

²⁷ Senators John McCain and George Allen recently wrote to Commission Chairman Powell indicating their support for an auction delay. The Senators noted that "[t]he Commission should carefully consider and review all options regarding the spectrum and base its decision on what will be best for the American taxpayers." Letter to Commission Chairman Michael K. Powell from Senators John McCain and George Allen, dated April 22, 2002.

defense and public safety, as discussed above. Since the Commission has not considered many aspects of these goals, it would be ill advised to rush to commit this spectrum, especially when such action could well lead to a poor and inefficient use.

The other date reference is in the Balanced Budget Act of 1997 ("BBA '97"). BBA '97 added a new Section 337, which allocated 36 MHz of the upper 700 MHz band for commercial uses, 30 MHz of which is the subject of auction number 31. Section 337(b)(2) required that the competitive bidding for this spectrum commence after January 1, 2001, while section 3007 required that proceeds for competitive bidding required by the act be deposited no later than September 30, 2002. However, in 1999, Congress enacted the Consolidated Appropriations Act, 2000, ("CAA") and revised the schedule for the auction to require the deposit of funds by September 2000. In so doing, the CAA provided that "[c]ommencing on the date of enactment, the [Commission] shall initiate the competitive bidding process previously required under section 337(b)(2)...(as repealed by the amendment made [herein])."²⁸ Accordingly, by deleting Section 337(b)(2) Congress intended to repeal the BBA '97 deadline, removing the spectrum in question from the operation of Section 3007. The Commission, of course, later determined that overriding statutory responsibilities compelled it to postpone the auction beyond the 2000 deadline. It received support for that action from the then-Chairmen of the Senate Budget and Appropriations Committees, among others.

After the Commission postponed the auction, no further legislative action has been taken by Congress—either to set a new date, affirm or reinstate a 2002 date, or compel some specific action by the agency. This inaction suggests that Congress was not inclined to re-impose a fixed date for the auction of this spectrum, for if it were so inclined, it has had ample opportunity to make its intentions known.

II. No Party Has Standing to Challenge a Delay of the 700 MHz Auction.

If the Commission were to decide to delay the 700 MHz auctions, a party that opposes the delay would have two avenues through which to challenge the delay—(1) a 47 U.S.C. § 402(a) petition for review of the agency order that announces the delay, or (2) an APA § 706 action to compel agency action "unlawfully withheld or unreasonably delayed." As indicated above, any such challenge is merit-less because of the agency's fundamental authority in this area. However, there is also an insurmountable obstacle to a court ever hearing a challenge to delay of the auctions: no party has *standing* to challenge a delay in the auction.

In order to challenge agency action or inaction, a party must have both *constitutional* and *prudential standing*. In the case of the 700 MHz auctions yet to be held, no party has either. First, as to constitutional standing, a would-be challenger is required, "at an irreducible minimum," to "show that he personally has suffered some actual or threatened *injury* as a result of the putatively illegal conduct" of the

²⁸ Consolidated Appropriations Act, 2000, Pub. L. No. 106-113, 113 Stat. 2502, Appendix E. Sec. 213, 113 Stat. 1536, 1501A-295.

Commission.²⁹ Any party that believes it would benefit from possessing the licenses (or the more likely future interest in the licenses) now set to be auctioned simply cannot show that delaying the auction would result in “actual” and “imminent” harm.³⁰ At the same time, any broadcast party now holding a license in this band and expecting to be paid to relocate before required to do so by Section 309 (j)(14) of the ‘34 Communications Act could not show harm since bidders are not even required to pay the broadcasters to relocate. In both cases, showing any potential injury from the delay requires too many steps of speculation.

The window for the Commission’s accepting applications to participate in the auctions is not yet open, and the class of participants is not yet known. Accordingly, a prospective bidder, as a challenger, would have to argue the following in order to support a hypothetical theory of injury:

- The party would complete and timely submit its application to participate in the auction;³¹
- the party would be able to make the required upfront payment and timely submit the Remittance Advice Form;³²
- the party would be deemed qualified by the Commission and be permitted to participate in the auction;³³
- the party would then actually participate in the auction;³⁴
- the party would be the highest bidder;
- the party would complete and timely submit the long-form application to accept the license;³⁵
- the party would be able to, and would, make the required down payment to accept the license;³⁶
- the Commission would reject any petitions to deny the award of the license to the party;³⁷
- the license would become available to be assigned to the party; and
- the party would be able to pay the remaining balance of the bid.³⁸

²⁹ *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982) (internal quotation marks omitted) (emphasis added).

³⁰ *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

³¹ See 47 C.F.R. § 1.2105.

³² See *id.* at § 1.2106 (upfront payment and FCC Form 159).

³³ See *id.* at § 1.2105.

³⁴ At least with respect to the auction for the Upper 700 MHz band, the party would also need to show that the reserve price of \$2.6 billion would be met and that the auction would then proceed. See Letter to Thomas E. Wheeler from Thomas J. Sugrue, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, dated April 10, 2002. In the event the Commission were to decide to cancel the auctions after receiving the short-form applications, a party would still need to show the remaining steps to injury that would be no less speculative.

³⁵ See *id.* at § 1.2107(c).

³⁶ See *id.* at § 1.2107(b).

³⁷ See *id.* at § 1.2108.

³⁸ See *id.* at § 1.2109.

With this chain of assertions, "it is surely no more than conjecture" to suggest that any particular party would be the winning bidder, "[a]nd it is surely no more than speculation to assert" that a winning bidder will actually receive any benefits from being deemed the winner.³⁹

Similarly, in order to show actual harm, a broadcast challenger would have to argue:

- that the minimum bid set by the Commission would be met;⁴⁰
- that someone would actually bid on that broadcaster's license; and
- that the winning bidder in the auction for that license would be willing to pay the broadcaster to relocate before the 2006 measure became effective.

As with the prospective winning bidder, the broadcast challenger's story of injury depends on circumstances that require multiple steps of speculation, dependent on multiple acts by the Commission and third parties, that amount at this point to "no more than conjecture."

It is not merely the sheer number of steps required to reach injury that makes any prospective opposing party's injury less than "imminent."⁴¹ Each step in the injury story is replete with uncertainty. For example, the proper filing of a short-form application requires numerous certifications, including, among other things, that the applicant is ultimately "legally, technically, [and] financially" qualified to hold the licenses, and that the applicant is not in violation of any foreign ownership restrictions.⁴² Similarly, the determination of the winning bidder is not made solely based on ability or willingness to pay the highest price. Rather, there are numerous credits that qualified bidders may use to boost their bid price.⁴³ Therefore, without knowing whom the other participants are and what credits they are entitled to, the assessment whether a particular party would even be in the ballpark of the competitive bidders is wholly "conjectural."⁴⁴

Even if the field of competitive bidders were known, there are numerous speculative steps remaining in the injury story. As a prime example, the winning prize in the 700 MHz auctions may itself be illusory. There is no requirement that incumbent television stations surrender the spectrum in question before December 31, 2006.⁴⁵ Even then, the Commission could extend the deadline for vacating the spectrum for a variety reasons.⁴⁶ Although it is clear that the government would benefit immediately

³⁹ *City of Los Angeles v. Lyons*, 461 U.S. 95, 109 (1983) (rejecting a much less attenuated theory of injury).

⁴⁰ See Auction of Licenses in the 747-762 and 777-792 MHz Bands Scheduled for June 19, 2002, Further Modification of Package Bidding Procedures and Other Procedures for Auction No. 31, FCC Rept. No. AUC-02-31-B, DA 02-659, at 33 & n.111 (Mar. 19, 2002).

⁴¹ *Lujan*, 504 U.S. at 560.

⁴² See 47 U.S.C. § 308(b); *id.* at § 310.

⁴³ See 47 C.F.R. § 1.2110.

⁴⁴ *Lujan*, 504 U.S. at 560 (rejecting standing where injury is merely "conjectural").

⁴⁵ See 47 U.S.C. § 309(j)(14)(A).

⁴⁶ See *id.* at § 309(j)(14)(B).

from collecting revenue from high bidders, there is no certain benefit for “winning bidders.” On the contrary, the winning bidders could very likely end up the losers in both the short-run and in the long run. Because they are forced to pay for the licenses years in advance of even possibly collecting the licenses or gaining access to the spectrum, “winning” bidders would most likely lose years worth of interest and suffer from an impaired credit rating. Postponement of the auctions, therefore, may be just as likely to *benefit* any prospective participant and “winner” as to injure it.

With respect to a potential broadcast challenger who would like to sell out early, the uncertainties are equally devastating to a non-conjectural showing of injury. For example, the broadcaster would have to show that a party, actually qualified to participate in the auction, would bid on its particular license. This is no small requirement given that the Bureau itself has acknowledged that by setting a reserve price, interest in the Upper 700 MHz band may be so altogether lacking that the scheduled auction would be cancelled.⁴⁷ And, even if an auction participant were willing to bid and was ultimately granted the option for the license, it is highly speculative that the broadcaster and the winning bidders would be willing, not only to engage in negotiations, but to reach mutually agreeable terms favorable to the broadcaster.

It is indeed plausible that there are numerous parties who have a genuine and vigorous interest in the Commission proceeding with the auctions. A party’s interest, however, will not establish standing if it cannot show with some degree of certainty that it is “immediately in danger” of being adversely affected by that action.⁴⁸ In the case of 700 MHz spectrum, not only is the possibility of any party sustaining injury highly conjectural in and of itself, but also there is no immediacy to any future-looking impact that conducting the auction could produce. Even for the broadcaster who may seek to voluntarily transfer a license before 2006, the time delay between the holding of the auction and the point at which the broadcaster, hypothetically, would reach an agreement with the winning bidder could well be years. For all of these reasons, no party can establish injury in fact based on a theory that delay somehow affects its chances for claiming the benefit of ownership or of relinquishing use of the spectrum.

Alternatively, if a party wishing to challenge delay of the auctions were to construct a theory of injury based purely on the delay itself and not on harm resulting from failing to receive the licenses, its standing story would fare no better. Not only would the party still be required to show that it would be permitted to participate in the auction, but it would also have to show some inherent value to participation in an auction that may or may not ever yield a winning prize.⁴⁹ Participation in an auction for

⁴⁷ Letter to Thomas E. Wheeler from Thomas J. Sugrue, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, dated April 10, 2002.

⁴⁸ *Lyons*, 461 U.S. at 101-02.

⁴⁹ A party might attempt to assert that it has an interest in the auction being held because the auction confers some generalized benefit on the public—the raising of revenue. However, under such a theory, the party would run afoul of the standing requirement that the injury be “concrete” and “particularized.” That is, such a theory would “rais[e] only a generally available grievance” about the Commission and the party would “seek[] relief that no more directly and tangibly benefits him than it does the public at large.” *Lujan*, 504 U.S. at 573-74.

spectrum is time-consuming and expensive;⁵⁰ but the benefit comes from winning the auction game, not from the mere act of playing in it. Without a non-conjectural threat of injury that is both “concrete” and “particularized,”⁵¹ any party’s “claim of standing” in this case would necessarily be “predicated on ‘the right, possessed by every citizen, to require that the Government be administered according to law,’” and this theory has been “repeatedly ... rejected” by the Supreme Court.⁵²

Even if a prospective bidder were to show injury in fact and to meet all of the constitutional standing requirements, it must still meet an additional requirement to satisfy the long-accepted prudential standing requirement. In order to challenge agency action or inaction under a statute, the plaintiff must show that it at least arguably falls within the “zone of interests to be protected or regulated” by that statute.⁵³ No party falls within the zone of interest of the statutory deadlines for the 700 MHz auctions.

The statutory deadlines for auctioning the 700 MHz spectrum are revenue-raising measures. Congress spoke in terms of collecting funds—“[t]he Commission shall complete the assignment of [the] licenses, and report to Congress the *total revenues* from such competitive bidding, by September 30, 2002”,⁵⁴ and “[t]he ... Commission shall conduct the competitive bidding process ... in manner that ensures that *all proceeds* of such bidding are deposited ... not later than September 30, 2000.”⁵⁵ Thus it is clear from the face of the statute that the benefit Congress sought to confer through imposition of the deadlines was the collection of revenue for the Treasury, and the only entity that is regulated with respect to the deadlines is the Commission itself.⁵⁶ While regulation of the procedures used to conduct the auction, such as qualification requirements and computation of the highest bid, may directly affect the participants

⁵⁰ Bid preparation expenses would not constitute an injury establishing standing. The Commission’s notices specifically state that potential bidders are responsible for identifying risks associated with the auction. Parties could reasonably expect that the auction could be postponed, as it already has been postponed five times. Certainly the incumbency situation has not markedly changed. Hence, there would be no “causal connection between the injury and the conduct complained of” even assuming a showing of concrete injury could be made. *Lujan*, 504 U.S. at 560.

⁵¹ *Lujan*, 504 U.S. at 560.

⁵² *Valley Forge*, 454 U.S. at 482-83 (quoting *Fairchild v. Hughes*, 258 U.S. 126, 129 (1922)).

⁵³ *Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150, 153 (1970).

⁵⁴ 47 U.S.C. § 309(j)(14)(C)(ii) (emphasis added). This provision refers to Section 309(j)(3), which generally supports the delay, not injury or standing to object to delay.

⁵⁵ *Id.* at 337 Note at Sec. 213(a)(3) (Consolidated Appropriations Act, 2000, Pub. L. No. 106-113, 113 Stat. 2502, Appendix E, Sec. 213) (emphasis added). As Senator Domenici confirmed, “[t]he purpose of th[e] acceleration [of the deadline] was to provide an ‘offset’ so that fiscal year 2000 appropriations would not exceed the spending limits established in law.” Letter to Chairman William E. Kennard from Senator Pete V. Domenici, Chairman, Senate Budget Committee, dated May 5, 2000.

⁵⁶ The deadline itself did not create any *new* zone of interest beyond what already existed in the communications act. This is not to suggest that Congress paid no heed to prospective bidders. To the contrary, § 309(j)(14)(C)(ii), added as part of the Balanced Budget Act of 1997, did refer to section 309(j)(3), which requires that adequate time be allowed to permit prospective bidders to “develop business plans, assess market conditions, and evaluate the availability of equipment for the relevant services.” Section 309(j)(3) is designed, however, to promote the public interest in maximizing the value of the spectrum by seeking to achieve the highest and best use for that resource. In that sense, Section 309(j)(3) works as a *condition* or *limit* upon application of the deadline, in the interest of value maximization, not as a protection for prospective bidders.

and regulate them, Congress simply was not setting the dates for the benefit of any participants. Likewise, because the deadlines address only the assignment of future interests in the spectrum and do not alter the statutory deadlines for clearing the 700 MHz band, it is clear that Congress did not intend for the auction deadlines to *protect* or *regulate* the interests of incumbent broadcasters. Thus, the would-be challengers do not fall within the zone of interest Congress created when it enacted the statutory deadlines.

Certainly opponents of delay will argue that if they are not permitted to challenge delay of the auctions, then no one will be able to enforce the statutory deadlines. The Supreme Court, however, has repeatedly rejected the argument that “if [plaintiffs] have no standing to sue, no one would have standing” as a basis for finding standing.⁵⁷ Thus, the Commission need not place the fear of being sued above its obligation to enforce *all* provisions of its statutory mandate and should not allow the possibility of opposing parties in this instance to act as a heckler’s veto to reasoned agency decision making.

III. Conclusion.

The Commission may legally postpone these auctions. Given the persistent clearing issues and the heightened public safety concerns, the Commission’s statutory mandate demands delay of the 700 MHz auctions until these matters can be addressed. In addition, no party currently has the standing necessary to bring a judicial challenge to any Commission decision to delay the auctions. Accordingly, the Commission should—indeed it must—act promptly to effectuate a postponement.

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⁵⁷ *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 489 (1982) (internal quotation marks omitted) (quoting *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 227 (1974)); accord *United States v. Richardson*, 418 U.S. 166, 179-80 (1974).